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I. INTRODUCTION

Preemption doctrine is notoriously muddled. Statutory preemption questions alone involve a confusion of presumptions, interpretive canons, ever-mutating categories of "conflict," and vague oaths to congressional intent and the Supremacy Clause.[1] But increasingly, preemption cases involve an additional source of confusion: input from federal administrative agencies. Agencies greatly outpace Congress in the production of laws; and they are the day-to-day handlers of most complex federal statutory schemes.[2] So it is not surprising that William Eskridge found that federal agencies offer input to courts in the vast majority of preemption cases.[3] The most obvious—and perhaps most difficult—question that agency involvement adds to preemption cases is whether and to what extent courts should defer to agencies' positions on preemption.[4]

The Supreme Court's treatment of the issue in *Riegel v. Medtronic, Inc.*[5] does not, at first blush, appear to clarify much. *Riegel* involved preemption under the Medical

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1. On presumptions, see e.g. Ernest A. Young, *Executive Preemption*, 102 Nw. U. L. Rev. 869, 876–77, 876 n. 45 (2008) (discussing debates on the presumption against preemption). On interpretive canons, see e.g. Garrick B. Pursley, *The Structure of Preemption Decisions*, 85 Neb. L. Rev. 912, 937–38 (2007) (noting various interpretive canons applied in preemption cases). On the varieties of conflict preemption, see e.g. Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. Rev. 727, 739 (2008) (observing "multiple categories of implied preemption, the exact number depending on who is doing the counting."); *Pursley* at 926–27 (also noting the focus on congressional intent). On the role of congressional intent, see e.g. Pursley, *supra* n. 1, at 926–27 (noting the focus on congressional intent); Merrill, *supra* n. 1, at 740 (same). On the role of the Supremacy Clause, see e.g. Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L. Rev. 767, 769 (1994) (observing that "[s]tatements of preemption law almost routinely 'start from the top' with a reference to the Supremacy Clause").

2. *INS v. Chadha*, 462 U.S. 919, 985–86 (1983) (White, J., dissenting); Merrill, *supra* n. 1, at 755; *see* Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 Geo. Wash. L. Rev. 449, 485–86 (2008).

3. William N. Eskridge, Jr., *Vetogates,* Chevron, *Preemption*, 83 Notre Dame L. Rev. 1441, 1472–73. 1472 n. 144, app. (2008) (reporting that of the 131 cases involving preemption issues decided between the Court's 1984 and 2005 terms, more than 80 percent involved input from administrative agencies on preemption).

4. Agency involvement with preemption has its own rich literature. *See generally* Nina A. Mendelson, Chevron *and Preemption*, 102 Mich. L. Rev. 737, 794–95 (2004); Merrill, *supra* n. 1; Catherine M. Sharkey, *The Fraud Caveat to Agency Preemption*, 102 Nw. U. L. Rev. 841 (2008); Young, *supra* n. 1.

5. 128 S. Ct. 999 (2008).

Device Amendments (MDA) to the Food, Drug, and Cosmetics Act, which the FDA administers.[6] The FDA offered the Court its interpretation of the scope of preemption under the MDA in regulations[7] and briefs,[8] but the Court based its decision on the statute alone, making clear that it was "[n]either accepting nor rejecting the proposition that" the FDA's views "can properly be consulted to determine the statute's meaning."[9] Though the Court's language is a bit ambiguous, I think that *Riegel* may represent a potentially fruitful rule requiring judicial avoidance of the question of deference to agency inputs in preemption cases. I explore and defend that rule here.

First, let me make clear what sort of "agency inputs" into preemption I am concerned about. The preemptive scope of a statute is determined by judgments about whether, and what kinds of, state laws conflict with the statute and whether such a conflict is significant enough to warrant preemption.[10] Typically, these are determinations that *courts* make, using familiar methods of statutory interpretation. But more and more, agencies attempt to supplant courts by offering their own interpretations of the preemptive scope of statutes—which I will call agency "preemption interpretations."[11] If the statute has express preemption language, agency preemption interpretations may be fairly straightforward constructions of that language. But they may also be based on any of the forms of conflict—including conflict with the underlying purposes of a statute—that are recognized as legitimate bases for preemption in judicial doctrine.[12] And I don't want to focus solely on agency preemption interpretations that would result in preemption of state law; sometimes agencies offer interpretations that, if adopted, would save the challenged state law from preemption.[13] I mean to include these, too, in the category of "preemption interpretations."

Preemption interpretations may be explicit or implicit. Explicit preemption interpretations may be mere interpretations with no other regulatory function, like those contained in the regulations and amicus briefs in *Riegel*.[14] Or, explicit preemption interpretations may be predicates for substantive regulations that purport to preempt state law themselves, like the preemption language in the preamble to the FDA's 2006 drug

6. *Id.* at 1000–01; 21 U.S.C. §§ 360(c)–360(n) (2006); *id.* at § 371(a) (2006).

7. 21 C.F.R. § 808.1 (2009).

8. Br. for the U.S. as Amicus Curiae, *Riegel v. Medtronic, Inc.*, 127 S. Ct. 3000 (2007) (mem.) (petition stage brief); Br. for U.S. as Amicus Curiae Supporting Respt., *Riegel*, 128 S. Ct. 999 (merits stage brief).

9. *Riegel*, 128 S. Ct. at 1011.

10. *See* Merrill, *supra* n. 1, at 743.

11. *See generally* Thomas O. McGarity, *The Preemption War: When Federal Bureaucracies Trump Local Juries* (Yale U. Press 2008). For examples, see Mendelson, *supra* n. 4, at 753; Nina A. Mendelson, *A Presumption against Agency Preemption*, 102 Nw. U. L. Rev. 695, 699–704 (2008) [hereinafter Mendelson, *Presumption*].

12. For examples of agency interpretations relating to whether state law is preempted as an "obstacle" to federal statutory purposes, see e.g. Br. for U.S. as Amicus Curiae Supporting Petr. at 19, *Wyeth v. Levine*, 129 S. Ct. 1187 (2009) (arguing that FDA drug labeling decisions constitute a "floor" and a "ceiling" on warnings for purposes of obstacle preemption under the FDCA); Br. of U.S. as Amicus Curiae Supporting Respts. at 25, *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008) (denying any FTC policy approving the use of "Light" and "Low Tar" descriptors in cigarette labeling for purposes of obstacle preemption under the Federal Cigarette Labeling and Advertising Act).

13. *E.g.* Br. of U.S. as Amicus Curiae Supporting Respts., *Altria*, 129 S. Ct. 538; *see also infra* n. 154 and accompanying text.

14. *Infra* nn. 51–63 and accompanying text.

labeling regulations at issue in *Wyeth v. Levine*.[15] Where a regulation purports (or is argued) to preempt state law, a preemption interpretation must be at least implicit: Since the legitimacy of all agency action depends on the statutory delegation of authority to the agency, arguably preemptive agency regulations necessarily depend on the agency's interpretive conclusion that the statute permits preemption of the kind purportedly effected by the regulation.[16] Where it is merely implicit, the agency's preemption interpretation, to a court, is just something like "the agency thinks that the statute permits regulations like this to preempt state law."[17]

The extent to which courts should defer to agency preemption interpretations, I argue, turns on whether agencies may legitimately issue preemption interpretations that are *binding*—that supplant judicial preemption interpretations—in judicial decisionmaking. So far, we have no clear answers.

Considered in the relevant doctrinal context, *Riegel* may be less anomalous than it appears. The Supreme Court has not definitively resolved which of the established deference rules—*Chevron*[18] or *Skidmore*[19]—should apply to agency preemption interpretations.[20] Nor has it resolved the propriety of agency claims that substantive regulatory actions may preempt state law on their own.[21] This does not mean that courts are not considering agency preemption interpretations. Catherine Sharkey suggests that in preemption cases "the Court's reliance upon agency input has often been *sub silentio*."[22] Eskridge argues that the Court has most often applied a modified version of *Skidmore* deference that takes account of persuasive agency interpretations but does not necessarily constrain courts to adopt the agency's interpretation.[23] Highlighting the absence of a clear rule, several scholars encourage courts to adopt more-or-less modified versions of *Skidmore* deference when considering agency preemption interpretations.[24]

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15. 129 S. Ct. 1187. The FDA's preemption preamble is at 71 Fed. Reg. 3922, 3935–36 (Jan. 24, 2006). Such a regulation was also considered in *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007), discussed *infra* notes 72–77 and accompanying text.

16. *La. Pub. Serv. Commn. v. FCC*, 476 U.S. 355, 374 (1986) (holding that "an agency literally has no power to act, let alone pre-empt [state law], unless and until Congress confers power upon it."); Mendelson, *Presumption*, *supra* n. 11, at 705 (stating that "[o]n review, courts have sometimes framed the relevant question as whether these [preemptive regulations] merit application of the *Chevron* doctrine. Implicit in this framing is a judicial characterization of the agency's decision (sometimes matched by the agency's own express characterization) as an authorized legal interpretation to which some form of judicial deference . . . is due." (footnote omitted)).

17. An agency attempt to claim preemptive authority without a supporting statutory interpretation would raise serious concerns. *See* Young, *supra* n. 1, at 894–95. However, if an agency's claim to preemptive authority truly does not depend on a statutory interpretation, it does not raise the kind of deference questions I am concerned with here.

18. *Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837 (1984).

19. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

20. Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism without Congress*, 57 Duke L.J. 2111, 2132, 2132 n. 83 (2008); *see* Eskridge, *supra* n. 3, at 1473–74; Sharkey, *supra* n. 2, at 471–77; Young, *supra* n. 1, at 883–85.

21. *Cf.* Young, *supra* n. 1, at 870 (noting that "the Court has tended to say simply that '[f]ederal regulations have no less pre-emptive effect than federal statutes.'") (quoting *Fid. Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153 (1982)).

22. Sharkey, *supra* n. 2, at 492.

23. Eskridge, *supra* n. 3, at 1473–74; Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 Colum. L. Rev. 1235, 1252–56 (2007).

24. *E.g.* Mendelson, *supra* n. 4, at 797–98; Merrill, *supra* n. 1, at 775–76; Sharkey, *supra* n. 2, at 497–98.

Judicial oscillation on the question of deference to agency preemption interpretations is perhaps to be expected, given the stakes. Federal preemption of state law implicates important constitutional and regulatory interests. On one hand, recognizing an authoritative role for agencies in interpreting the preemptive scope of federal law would likely make for more preemption at the expense of federalism values.[25] It would add to the preemption universe an additional category of actors—federal agencies—with built-in institutional incentives to push for nationalizing regulatory regimes.[26] On the other hand, allowing agencies with relatively greater expertise than courts to determine whether state law is preempted may be the best way to efficiently allocate regulatory authority among the national and state governments.[27] More abstractly, existing doctrine leaves open questions about the constitutional basis for *Congress's* preemptive authority;[28] agency involvement puts additional pressure on preemption's underdefined normative basis by raising questions about whether preemption authority can be exercised by, or delegated to, the executive branch.[29]

I want to resist suggesting that the courts adopt one or another of the deference rules that have been proposed for agency preemption interpretations. While one might read *Riegel* (and most other preemption cases where agencies offer preemption interpretations) as implicitly adopting some deference rule, it is more plausibly read as avoiding the deference question altogether. The opinion's language—"[n]either accepting nor rejecting the proposition that"[30] the FDA's interpretation "can properly be consulted to determine the statute's meaning"[31]—seems to affirmatively promote ambiguity on that question under something like an avoidance rule. In this Article, I suggest that courts can implement important constitutional norms by avoiding the decision of whether agency interpretations regarding the preemptive scope of federal statutes are entitled to any deference, under what I will call the "deference-avoidance rule."

I argue that there are colorable constitutional doubts about the legitimacy of constraining judicial interpretive authority on the question of whether federal law preempts state law. And deference constitutes just such a constraint. *Chevron* deference is based on the idea that Congress may shift authority to interpret ambiguous statutory provisions from courts to agencies. It is thus a binding form of deference—where *Chevron*'s requirements are satisfied, courts must adopt the agency's interpretation.[32]

Mendelson now advocates a presumption against even *Skidmore* deference to agency preemption decisions. *See generally* Mendelson, *Presumption*, *supra* n. 11. Young proposes a preemption-specific form of *Skidmore*. Young, *supra* n. 1, at 891–93.

25. Young, *supra* n. 1, at 869–70, 876–81.

26. Eskridge, *supra* n. 3, at 1455. Eskridge argues that agencies are likely to "press the statute toward more, rather than less, government regulation." *Id.* Agencies are also likely to engage in "turf building." *Id.* at 1455 n. 56.

27. *See* Lisa Schultz Bressman, Chevron*'s Mistake*, 58 Duke L.J. 549, 614–17 (2009); Sharkey, *supra* n. 2, at 486.

28. *See generally* Pursley, *supra* n. 1.

29. *See U.S. v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); *Chevron*, 467 U.S. at 843–44; *see also* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 Geo. L. J. 833, 853–56 (2001).

30. *Riegel*, 128 S. Ct. at 1011.

31. *Id.*

32. *See infra* nn. 104–12 and accompanying text.

But a plausible construction of the Supremacy Clause requires that courts primarily and independently interpret federal law to determine whether there is a conflict with state law sufficient to give rise to preemption. Avoiding determining the applicability of *Chevron* deference thus allows the Court to avoid the difficult constitutional question of whether judicial primacy on preemption can be shifted to agencies. In addition to *Chevron*, there is the *Skidmore* deference rule, which is not based on congressional delegation of interpretive authority, but rather flexibly calibrates deference according to the persuasiveness of the agency's interpretation. Even though self-imposed by courts, *Skidmore* also is viewed as a binding constraint on judicial interpretive authority where it applies.[33] Avoiding determining *Skidmore*'s applicability amounts to avoiding constitutional doubts about whether courts may abdicate judicial primacy on preemption on instrumental grounds. I thus defend the deference-avoidance rule as what Ernest Young and others call a "normative" rule of statutory interpretation—a rule desirable and defensible not because it leads to the most accurate statutory interpretations but because it enforces constitutional norms.[34]

Courts can avoid resolving the question of whether agency preemption interpretations are entitled to deference in two ways, each corresponding to one of the two established deference rules. First, they can avoid determining whether it is constitutionally permissible to accord *Chevron* deference to an agency preemption interpretation by construing ambiguous statutory grants of agency authority narrowly—so as not to include the power to authoritatively interpret the preemptive scope of statutes. Of course, if Congress enacted clear statutory language specifically delegating to an agency the authority to issue preemption interpretations, a court would have to resolve the constitutional doubts about *Chevron* deference to agency preemption interpretations; after that, those doubts would no longer provide a reason for avoidance. But so far, Congress has done no such thing. Second, courts can avoid determining whether agency preemption interpretations are entitled to *Skidmore* deference by reaching independent interpretive conclusions about the preemptive effect of the statutory provisions that are the subject of the agency's preemption interpretation. The upshot in both avoidance situations is that the court will independently interpret the statute to determine whether it in fact effects the purported preemption.

Part II makes clear why I view *Riegel* as an instance of judicial avoidance of the question of deference to agency preemption interpretations. I also discuss what I view as *Riegel*'s logical precursor, *Watters v. Wachovia Bank*.[35] Part III discusses the broader family of constitutional avoidance rules to which the deference-avoidance rule belongs.[36] I then discuss judicial deference doctrines in more detail to make clear how the deference-avoidance rule would function on the ground. Part IV examines possible justifications for the deference-avoidance rule, including justifications based on

33. *See infra* nn. 137–39 and accompanying text.

34. *See* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 Tex. L. Rev. 1549, 1586–87 (2000); Bressman, *supra* n. 27, at 611–13; Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 Vand. L. Rev. 743, 743–44 (1992).

35. 550 U.S. 1.

36. *See generally* Young, *supra* n. 34.

constitutional federalism and non-delegation norms. I argue that the rule is best justified as a way of enforcing a constitutional norm allocating to the judiciary the authority to decide whether and to what extent federal law preempts state law. It does this by allowing courts to avoid addressing constitutional doubts about whether agencies may supplant courts in this interpretive task. A brief conclusion follows.

II. AVOIDANCE IN *RIEGEL* AND *WATTERS*

In *Riegel*, the Court considered whether the FDA's full premarket approval process for medical devices preempted state law tort claims against the manufacturer of an arterial balloon catheter.[37] The Medical Device Amendments (MDA) to the federal Food, Drug and Cosmetics Act, which give the FDA its premarket approval authority for medical devices,[38] expressly preempt state "'requirement[s]'" relating to medical devices that (1) are "'different from, or in addition to'" any federal "'requirement applicable . . . to the device,'" and (2) "'relate[] to the safety or effectiveness of the device or to any other matter included in a [federal] requirement applicable to the device.'"[39] This language required the Court to address two basic questions: First, whether there was a federal "requirement" applicable to the catheter; and second, whether the tort claims constituted state-law "requirements with respect to the device . . . 'different from, or in addition to' the federal ones, and relate[d] to safety and effectiveness."[40]

To answer the first question, the Court relied on its construction of the MDA in *Medtronic, Inc. v. Lohr*,[41] to conclude that the full FDA premarket approval process created preemptive federal "requirements."[42] *Lohr*'s interpretation of the MDA's preemption provision, as the *Riegel* Court noted, was "substantially informed"[43] by an FDA regulation stating that only "specific [federal] requirements applicable to a particular device"[44] would preempt state law.[45] Indeed, although *Riegel* omits mentioning it, one reading of the majority opinion in *Lohr* is that the FDA's interpretation of the MDA preemption provision was entitled to *Chevron* deference.[46] But *Lohr* is ambiguous: The majority did not explicitly say that it was deferring to the agency's view under *Chevron*, even though it explained that the requirements for *Chevron* deference—statutory ambiguity and a reasonable agency interpretation—were satisfied.[47] Instead, rather cryptically, the majority said its analysis of the statute was

37. 128 S. Ct. at 1006.

38. *See supra* n. 6.

39. 21 U.S.C. § 360k(a) (2006); *see Riegel*, 128 S. Ct. at 1001 (quoting 21 U.S.C. § 360k(a)).

40. *Id.* at 1006 (quoting 21 U.S.C. § 360k(a)).

41. 518 U.S. 470 (1996).

42. *Riegel*, 128 S. Ct. at 1006–07.

43. *Id.* at 1007 (citing *Lohr*, 518 U.S. at 495).

44. *Id.* (citing 21 C.F.R. § 808.1(d) (1995) and referring to *Lohr*, 518 U.S. at 498).

45. *Id.* (quoting 21 C.F.R. § 808.1(d) (1995) as quoted in *Lohr*, 518 U.S. at 483).

46. *Lohr*, 518 U.S. at 496 (citing *Chevron*, 467 U.S. 837, and *Hillsborough Co. v. Automated Med. Laboratories, Inc.*, 471 U.S. 707 (1985)). In *Hillsborough*, the Court found the agency's understanding of the preemptive effect of its regulations "dispositive." 471 U.S. at 714.

47. *Lohr*, 518 U.S. at 496. This ambiguity has not gone unnoticed. *See Mass. Assn. of Health Maint. Orgs. v. Ruthhardt*, 194 F.3d 176, 182 (1st Cir. 1999); Sharkey, *supra* n. 2, at 493; Young, *supra* n. 1, at 885–86.

merely "substantially informed" by the FDA's interpretation;[48] and it said so in a section of the opinion immediately following one in which a plurality concluded, after examining the MDA's language and legislative history, that the *statute itself* made clear that only device-specific "requirements" were covered by the preemption provision.[49] The peculiar phrasing and analytic process leave one to wonder exactly what weight the *Lohr* Court gave to the FDA's interpretation and why. But the *Riegel* Court chose to simply repeat the confusing "substantially informed" language from *Lohr* without clarification—if anything, it muddied the waters even more by omitting all mention of *Chevron*, or any other deference rule, in addressing the question.[50]

In answering the second question—whether the challenged state tort laws were preempted state "requirements" under the MDA—the *Riegel* Court took an even more peculiar approach to weighting the FDA's views: It refused to decide how to weight them.

In *Lohr*, the majority noted that "Congress has given the FDA a unique role in determining the scope of § 360k's pre-emptive effect,"[51] both by delegating general authority to the FDA to implement the MDA and by "explicitly delegat[ing] to the FDA the authority to exempt state regulations from the pre-emptive effect of the MDA"[52] in § 360k(b).[53] Exercising this authority, the FDA, by regulation, exempted certain state requirements from preemption, including "State or local requirements that are equal to, or substantially identical to, requirements imposed by or under the [MDA]"[54] and "State or local requirements of general applicability where the purpose of the requirement relates either to other products in addition to devices . . . or to unfair trade practices in which the requirements are not limited to devices."[55] The *Lohr* Court relied on the "substantially identical" regulatory language to hold that state tort claims were not preempted if they amounted to claims that the manufacturer violated FDA requirements.[56]

The *Riegel* petitioners argued that the regulatory exemption for "State or local requirements of general applicability" precluded preemption of their claims, which were predicated on state common law duties of "general applicability."[57] But rather than accord the regulation the same deference—such as it was—that it received in *Lohr*, the Court in *Riegel* expressly refused to decide whether "this regulation can properly be consulted to determine the statute's meaning."[58] Instead, the Court held that the statute alone made clear that the state tort claims were preempted, explaining that:

> The MDA provides that no State 'may establish or continue in effect *with respect to a*

48. *Lohr*, 518 U.S. at 495–96.
49. *Id.* at 486–91.
50. *Riegel*, 128 S. Ct. at 1006–07.
51. 518 U.S. at 495–96.
52. *Id.* at 496.
53. 21 U.S.C. § 360k(b); *id.* at § 371(a); *Lohr*, 518 U.S. at 495–96.
54. 21 C.F.R. at § 808.1(d)(2).
55. *Id.* at § 808.1(d)(1).
56. 518 U.S. at 495.
57. Br. for Petr. at 33–34, 36, *Riegel*, 128 S. Ct. 999; Reply Br. for Petr. at 8, *Riegel*, 128 S. Ct. 999.
58. 128 S. Ct. at 1011.

> *device . . . any requirement*' relating to safety or effectiveness that is different from, or in addition to, federal requirements. The Riegels' suit depends upon New York's 'continu[ing] in effect' general tort duties 'with respect to' Medtronic's catheter. Nothing in the statutory text suggests that the pre-empted state requirement must apply *only* to the relevant device, or only to medical devices and not to all products and all actions in general.[59]

The Court's explanation for not deciding the deference question was convoluted. In addressing the FDA's call for deference to its broad MDA preemption position offered in the government's amicus brief,[60] the Court explained that even if it were inclined to consider deferring to the FDA's views—which it was not—those views were unreliable because the FDA had recently changed its position on the meaning of its own regulatory interpretation of the MDA's preemptive scope.[61] Contrary to its briefing position in *Riegel*, the FDA in earlier amicus briefs had cited its regulations to advocate narrower constructions of the MDA preemption provision.[62] In addressing the petitioners' suggestion that it defer to the FDA's earlier preemption-related regulations and simply disregard the FDA's contradictory briefing positions, the Court explained—again in the form of a hypothetical conditional—that even if the regulations were entitled to some deference, they did not unambiguously support a decision for or against preemption.[63] The Court thus refused to decide among the competing proffered deference approaches. Nevertheless, it effected the FDA's desired result; the state tort claims were preempted.

The Court's avoidance move in *Riegel* was of a piece with its explicit avoidance approach in *Watters v. Wachovia Bank*.[64] There, the issue was whether the National Bank Act (NBA),[65] or a regulation promulgated thereunder by the Office of the Comptroller of the Currency (OCC), preempted Michigan state mortgage lending regulations.[66] The NBA provides that "'[n]o national bank shall be subject to any visitorial powers except as authorized by federal law . . . .'"[67] The Court had previously construed this provision to preempt state laws that "prevent or significantly interfere with the national bank's or the national bank regulator's exercise of its powers."[68] OCC

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59. *Id.* at 1010 (emphasis in original) (citation omitted).

60. Br. for U.S. as Amicus Curiae Supporting Respt. at 23–24, *Riegel*, 128 S. Ct. 999.

61. *Riegel*, 128 S. Ct. at 1009 (discussing FDA's change of position and ultimately concluding that "[w]e have found it unnecessary to rely upon that agency view because we think the statute itself speaks clearly to the point at issue.").

62. *E.g.* Br. of U.S. as Amicus Curiae at 12, *Buckman Co. v. Plaintiffs' Leg. Comm.*, 531 U.S. 341 (2001); Br. of U.S. as Amicus Curiae, *Lohr*, 518 U.S. 470.

63. *Riegel*, 128 S. Ct. at 1009; Br. for Petr. at 33–34, *Riegel*, 128 S. Ct. 999. The Court's approach was similar in *Altria*, 129 S. Ct. at 549–50, involving preemption under the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331–1341 (2006). The cigarette manufacturer argued, for one thing, that state-law claims that labeling cigarettes "Light" or "Low Tar" constituted consumer fraud were preempted by the FTC's alleged policy of allowing cigarette manufacturers to use "Light" and "Low Tar" in their labeling. As it did in *Riegel*, the Court in *Altria* used the hypothetical-conditional formulation to avoid any question of deference, stating that "[e]ven if such a regulatory policy could provide the basis for obstacle pre-emption, petitioners' description of the FTC's actions in this regard are inaccurate." 129 S. Ct. at 549.

64. 550 U.S. 1.

65. 12 U.S.C. §§ 1–14 (2006).

66. 550 U.S. at 4.

67. *Watters*, 550 U.S. at 11 (quoting 12 U.S.C. § 484(a) (2006)). "Visitorial" authority includes supervisory and inspection powers. *Id.* at 14–15 (quoting 12 C.F.R. § 7.4000(a)(2) (2006)).

68. *Id.* at 12 (citing *Barnett Bank of Marion Co., N.A. v. Nelson*, 517 U.S. 25, 32–34 (1996); *Franklin Natl.*

administers the NBA, including the sections governing mortgage lending.[69] Michigan tried to enforce its mortgage laws—including a provision vesting "general supervision and control" over state-registered lenders in Michigan's Office of Insurance and Financial Services—against a Wachovia subsidiary.[70] Thus the preemption question was whether NBA provisions relating to national bank mortgage lending also applied to subsidiaries. If they did, then Michigan's attempts to regulate Wachovia's subsidiary would be preempted for interfering with Wachovia's and OCC's powers under the NBA.[71]

The Court's framing of the question is significant. In 2001, OCC provided by regulation that "State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."[72] The Sixth Circuit held that OCC's *regulation* preempted the Michigan laws regardless of "whether Congress has expressly and clearly manifested its intent to preempt" in the NBA.[73] The court concluded that OCC's regulations drew *Chevron* deference; thus, Michigan's concession that its laws conflicted with OCC regulations meant that "the only question is whether the Comptroller 'has exceeded [its] statutory authority or acted arbitrarily.'"[74] Finding OCC's regulation reasonable, the court of appeals held the Michigan provisions preempted.[75] Despite the clear basis for the Sixth Circuit's decision, and despite invitations by both Wachovia and the OCC to defer to the OCC regulation, the Supreme Court expressly avoided the deference question and affirmed the result on purely statutory grounds.[76] The Court explained:

> [U]nder our interpretation of the statute, the level of deference owed to the regulation is an academic question. [The regulation] merely clarifies and confirms what the NBA already conveys: A national bank has the power to engage in real estate lending through an operating subsidiary, subject to the same terms and conditions that govern the national bank itself; that power cannot be significantly impaired or impeded by state law.[77]

Watters thus prefigured the Court's avoidance move in *Riegel*.[78] The Court's two most recent preemption decisions, *Altria Group, Inc. v. Good* and *Wyeth v. Levine*,

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Bank of Franklin Square v. N.Y., 347 U.S. 373, 377–79 (1954)).

69. *Id.*; 12 U.S.C. §§ 24, 93a, 371(a) (2006).

70. *Watters*, 550 U.S. at 8 (citing Mich. Comp. Laws Ann. §§ 445.1661, 445.1665, 445.1666, 493.58, 493.56b, 493.59, 493.62a (West 2002)).

71. *Id.* at 14–15.

72. 12 C.F.R. § 7.4006 (2009).

73. *Wachovia Bank v. Watters*, 431 F.3d 556, 560 (6th Cir. 2005).

74. *See id.* at 560 (quoting *De la Cuesta*, 458 U.S. at 154).

75. *Id.* at 562–63.

76. *Watters*, 550 U.S. at 20–21. *See* Br. for the Respts. at 35–44, *Watters*, 550 U.S. 1; Br. for the U.S. as Amicus Curiae Supporting Respts. at 9–22, *Watters*, 550 U.S. 1.

77. *Watters*, 550 U.S. at 20–21.

78. *Cf.* Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 Duke L.J. 2023, 2046 (2008) (noting that "*Riegel* is in many ways a *Watters* redux, with the Court again eschewing the need to determine what level of deference to accord an administrative preemption determination . . . ."). While I think that *Riegel* and *Watters* may signal the adoption of a particular constitutional avoidance principle, Metzger thinks that "*Riegel* reinforces the impression that the Court is not approaching these cases with an eye" to constitutional concerns; instead it is "focused on the details of the specific statutory and regulatory schemes at issue." *Id.* at 2047.

similarly avoided the question of deference to agency preemption interpretations.[79] And it could be that the Court's non-committal treatment of deference in *Lohr* constituted avoidance.[80] Avoidance may explain Eskridge's observation that the Court often does not make clear which, if any, deference standard it is using.[81] It is also consistent with Eskridge's further observation that the Court decides preemption issues consistently with the agency's preemption interpretation most of the time—after all, as *Watters* and *Riegel* demonstrate, the Court may on statutory grounds reach the same conclusions as the agency.[82] But my claim is primarily normative. Justifying a deference-avoidance rule in preemption cases requires more than showing a rough correspondence to the Supreme Court's approach. To start making the justificatory case, I need to give some general theoretical background on avoidance rules.

III. THE CONDITIONS FOR AVOIDANCE: STATUTORY AND CONSTITUTIONAL DOUBTS

We can generalize the deference-avoidance rule as follows: Courts should avoid deciding whether to accord deference to agency interpretations of the preemptive scope of federal statutes. In this Part, I give some theoretical background on both judicial avoidance rules and deference doctrines. This should make for a better description of the deference-avoidance rule.

A. Kinds of Avoidance Rules

We can divide constitutional avoidance rules into "procedural" and "interpretive" avoidance.[83] Procedural avoidance cautions that federal courts should decide cases on non-constitutional grounds whenever they are available.[84] Here, avoidance orders issues for decision—courts address non-constitutional issues first to try to resolve cases without

79. For a discussion of *Altria*, see *supra* note 63 and accompanying text. For a description of the issue in *Levine*, see *supra* note 12 and accompanying text. Addressing the question of whether the FDA's preemption interpretation was entitled to deference, the *Levine* Court noted that "we have given 'some weight' to an agency's views about the impact of tort law on federal objectives when 'the subject matter is technica[l] and the relevant history and background are complex and extensive.'" 129 S. Ct. at 1201 (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000)). "[H]owever, we have not deferred to an agency's *conclusion* that state law is pre-empted." *Id.* (emphasis in original). The Court then said that the "weight we accord the agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness," seemingly referring to the *Skidmore* standard, but held that "the FDA's 2006 preamble does not merit deference" because it was inconsistent with what the Court determined was the clear congressional intent regarding preemption under the FDCA. *Id.* at 1201–05. This, like *Lohr*, is ambiguous. The Court did not make clear which deference standard it was rejecting, whether deference would have been binding had it applied, or whether deference could ever be required for agency "conclusions" about preemption—what I have labeled agency "preemption interpretations." And, as the dissent points out, the majority's conclusion about congressional intent was not as clear as the majority would have it. *Levine*, 129 S. Ct. at 1217–20 (Alito, J., Roberts, C.J. & Scalia, J., dissenting).

80. *See supra* nn. 41–49 and accompanying text.

81. Eskridge, *supra* n. 3, at 1473–74.

82. *Id.* at 1478 (noting that the Court's decisions were consistent with agencies' desired results 84.6 percent of the time when the agency opposed preemption, and 64.4 percent of the time when the agency favored preemption).

83. *See* Young, *supra* n. 34, at 1574–76. "Procedural avoidance" is Adrian Vermeule's coinage. *See* Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945, 1948 (1997).

84. Young, *supra* n. 34, at 1575; *see also* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. Rev. 1003, 1025 (1994) (calling this the "last resort rule"); *see e.g. Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring) (identifying seven components of the avoidance doctrine).

having to address constitutional doubts. They are only *doubts* because the constitutional issues are never actually decided. But procedural avoidance does not tug one way or the other in the disposition of particular issues on the merits.[85] Interpretive avoidance, by contrast, is a rule of statutory construction that determines a merits question by selecting from among competing possible interpretations one that avoids raising doubts about the statute's constitutionality.[86] It "cover[s] those cases in which the statute at issue *might* be unconstitutional"[87] and therefore does not require that the court actually decide the constitutionality of the statute under the dubious interpretation.[88] In other words, interpretive avoidance, too, is justified by constitutional "doubt."

Interpretive avoidance also requires that there be at least two reasonable interpretations of the statute—a constitutionally doubtful one and a safer alternative.[89] Identifying the statutory uncertainty is important because it brackets the cases in which interpretive avoidance has "bite."[90] Interpretive avoidance only does work if the most plausible reading is the constitutionally doubtful one. Under those circumstances, an avoidance rule directs the court to select the less plausible reading to avoid constitutional doubt. If the more plausible reading is also the constitutionally unproblematic one, then avoidance only directs the court to choose the interpretation it would have selected anyway as a matter of good statutory construction.[91] As Justice Scalia put it, "'[a]dopt the interpretation that avoids constitutional doubt if that is the right one' produces precisely the same result as 'adopt the right interpretation.'"[92]

Given that avoidance can take these different forms, characterizing the deference-avoidance rule requires further exploration of the deference questions being avoided.

B. Kinds of Deference Questions

Most any agency action potentially has preemptive effect. The prevailing judicial view is that valid ordinary federal regulations preempt conflicting state laws.[93] And courts accept that a federal agency's interpretation of a federal statute's substantive provisions indirectly may determine whether state laws are preempted when courts apply ordinary statutory preemption rules to the statute as construed by the agency.[94] The Court has no trouble straightforwardly addressing deference for an agency's interpretation of "the substantive (as opposed to pre-emptive) *meaning* of a statute"[95]; but it has distinguished agency interpretations of "*whether* a statute is pre-emptive"[96]—

85. Young, *supra* n. 34, at 1575; Vermeule, *supra* n. 83, at 1948.
86. Young, *supra* n. 34, at 1575; *see e.g. Crowell v. Benson*, 285 U.S. 22, 62, 62 n. 30 (1932).
87. Young, *supra* n. 34, at 1576 (emphasis added).
88. *Id.* at 1576 (emphasis added); *see id.* at 1578–79.
89. *Id.* at 1576.
90. *Id.* at 1577–78.
91. *Id.* at 1577.
92. *Almendarez-Torres v. U.S.*, 523 U.S. 224, 270 (Scalia, Stevens, Souter & Ginsburg, JJ., dissenting).
93. *De la Cuesta*, 458 U.S. at 153–54; *U.S. v. Shimer*, 367 U.S. 374, 381 (1961). For doubts, see Young, *supra* n. 1, at 894–900.
94. *See* Young, *supra* n. 1, at 884–85.
95. *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 744 (1996) (emphasis in original).
96. *Id.* (emphasis in original).

what I have labeled agency "preemption interpretations"—as more problematic.[97]

The focus on the difficulty of the specific question of deference for agency *preemption interpretations* is telling. One might think that the Court's approach in cases like *Riegel*, *Watters*, *Altria*, and *Levine* just reflects a general concern with the difficulty of figuring out the applicability of deference doctrines to the particular agency interpretations at issue in those cases. Courts may, and likely often do, avoid deciding issues that are for some reason particularly difficult. Where alternative grounds for decision are available, this is a way to avoid errors. But there is no real reason to think that the agency interpretations at issue in those cases, in and of themselves, presented particularly difficult problems for the applicability of established deference rules. And there is no indication that the Court was acting on this more general sort of concern. It did not grapple with the *Chevron* or *Skidmore* factors in evaluating the agency interpretations; instead, it focused on the fact that the interpretations were agency conclusions about preemption as the source of worry. So it seems fair to say that avoidance in these cases was motivated not by problems with deference in general but rather by problems with deference to agency preemption interpretations in particular. The deference-avoidance rule appears to be based on something about the nature of agency preemption interpretations.

Preemption cases almost always involve ambiguity about a statute's preemptive scope.[98] Indeed, the question of deference can only arise where there is such ambiguity—if the preemptive scope of the statute is clear, there is no interpretive work to be done and thus no question of deference to agency interpretations.[99] Despite their rhetoric of "clear" statutory meaning, neither *Riegel* nor *Watters* involved unambiguous preemption provisions. The dissents in both cases advanced plausible but contrary interpretations of the relevant statutory language.[100] The *Watters* dissent highlights the way the majority strained to rest its conclusion on statutory grounds, noting that "none of the four Circuits to have addressed this issue relied on the preemptive force of the NBA itself" but instead "asked whether the OCC's regulations preempted state laws."[101] Professor Young reminds us that "statutory clarity is emphatically a question of degree" and "the importance of any given canon or rule of construction will be . . . a function of the willingness of courts to find that statutes are 'unclear.'"[102] In cases like *Riegel* and

97. *Id.* at 739–40; *Levine*, 129 S. Ct. at 1201 (distinguishing agency views about "the impact of tort law on federal objectives," which may draw deference, from "an agency's *conclusion* that state law is preempted.") (emphasis in original).

98. *See generally* Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. Rev. 967 (2002).

99. Hickman & Krueger, *supra* n. 23, at 1246–47, 1264–66.

100. *Riegel*, 128 S. Ct. at 1013–20 (Ginsburg, J., dissenting); *Watters*, 550 U.S. at 22–44 (Stevens, J., Roberts, C.J. & Scalia, J., dissenting). In *Levine*, too, the dissent took issue with what the majority characterized as "clear" congressional intent regarding preemption under the FDCA. 129 S. Ct. at 1189–91 (Alito, J., Roberts, C.J. & Scalia, J., dissenting) (arguing that "Congress made its 'purpose' plain in authorizing the FDA—not state tort juries—to determine when and under what circumstances a drug is 'safe.'").

101. *Watters*, 550 U.S. at 32 (Stevens, J., Roberts, C.J. & Scalia, J., dissenting) (citing *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 315–16 (2d Cir. 2005); *Natl. City Bank of Ind. v. Turnbaugh*, 463 F.3d 325, 331–33 (4th Cir. 2006); *Wachovia Bank v. Watters*, 431 F.3d 556, 560–63; *Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d 949, 962–67 (9th Cir. 2005)).

102. Young, *supra* n. 34, at 1577.

Watters where the finding of statutory "clarity" is at least a stretch, I would add that the *visibility* of deference or avoidance rules will be a function of the willingness of courts to *admit* that statutes are unclear. As John Manning and others have pointed out, judicial findings of statutory clarity often mask silent applications of normative rules of interpretation.[103] The ambiguity of the preemption provisions and the fact that deference would have generated the same outcome the Court strained to reach on statutory grounds, I think, show that *Riegel* and *Watters* are better described as incorporating a deference-avoidance rule than as resting on "clear" statutory text.

The deference-avoidance rule may, but never necessarily will, alter the result in a case. After all, a court can always adopt, on statutory grounds, the interpretation proposed by the agency (if that option is not available, then it is unlikely that the agency interpretation would draw deference anyway). Deference-avoidance rejects only the invitation to decide whether the agency preemption interpretation is entitled to deference in the court's decisionmaking process. As long as the Court bases its decision on the statute rather than on deference to agency input, constitutional doubts raised by deferring to the agency's preemption interpretations do not favor one interpretation of the statute's preemptive scope over another.

To get a firmer grip on the deference-avoidance rule, we need to consider the deference rules in detail. The two established deference rules that might apply to agency preemption interpretations are *Chevron* and *Skidmore*. The difference relevant here is that *Chevron* involves a statutory question about the nature of the agency's delegated authority while *Skidmore* is a pragmatic standard that does not require analysis of the statutory delegation.

1. *Chevron* Deference and Statutory Doubts

The *Chevron* doctrine is based on the idea that Congress may by statute bind courts to accept reasonable agency statutory interpretations by delegating lawmaking authority to the agency.[104] Where there is ambiguity as to whether the statute in fact binds the court to accept the agency's interpretation of the statute's preemptive scope and deference would raise constitutional doubts, the court might interpret the statute not to require deference. This would be a species of interpretive avoidance.

Chevron deference requires a court to adopt an agency's interpretation of an ambiguous portion of the statute it is charged with administering so long as the agency's view is reasonable.[105] *Chevron* applies only to agency interpretations set forth under "circumstances reasonably suggesting that Congress" intended the particular form of interpretation to receive deference.[106] Where *Chevron* applies, the agency's

103. John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 S. Ct. Rev. 223, 231–37 (describing the Court's construction of the FDCA in *FDA. v. Brown & Williamson Tobacco Co.*, 529 U.S. 120 (2000), as an application of an avoidance canon disguised as a finding of "clear" legislative intent); *cf.* Mendelson, *supra* n. 4, at 745–47 (criticizing the idea of using normative canons in *Chevron*'s "Step 1").

104. Cass R. Sunstein, *Law and Administration after* Chevron, 90 Colum. L. Rev. 2071, 2093 (1990).

105. *Chevron*, 467 U.S. at 842–43.

106. *Mead*, 533 U.S. at 230–31. *Mead* extended *Chevron* to agency interpretations in any form "deserving" of deference—typically any form in which Congress empowered the agency to act with "the force of law." *Id.* at 226–27; *Christensen v. Harris Co.*, 529 U.S. 576, 586–87 (2000).

interpretation "is *binding* in the courts."[107] A reasonable agency interpretation must be adopted "even if it is not the interpretation that the court finds most plausible."[108] *Chevron* is generally justified on the ground that Congress impliedly delegated the power to issue authoritative interpretations of the statute to the agency.[109] Understood this way, *Chevron* implements a separation-of-powers principle: Since Congress unquestionably has the power to say what its legislation means, it follows that, *ceteris paribus*, Congress may delegate the power to resolve statutory ambiguities to agencies rather than courts.[110] A consensus of commentators, doctrine, history, and practicality all indicate that such delegations do not impermissibly intrude on the judiciary's authority to "say what the law is."[111] Indeed, failure to defer to an agency's interpretation in the face of such a delegation might amount to *judicial* usurpation of *legislative* power.[112]

In *United States v. Mead Corp.*,[113] the Court held that *Chevron* deference applies only when an agency acts pursuant to its particular delegated authority to take actions "with the force of law."[114] This focuses the *Chevron* inquiry on congressional intent regarding the content of the agency's delegated authority.[115] The presumption under *Chevron* is that ambiguous statutory language alone signals congressional intent to delegate interpretive authority to the agency regarding the subject of the ambiguous language. Recognizing that mere statutory ambiguity is a crude proxy for congressional intent, *Mead* refines the analysis by signaling courts to look for additional indicia of congressional intent to delegate. Statutory provision of procedures by which the agency may act "with the force of law" is one such additional proxy for congressional intent. In preemption cases, the *Mead* question is whether Congress intended the delegation to include authority to act "with the force of law" regarding preemption.[116] Since the deference issue will be about an agency preemption interpretation, the real question is whether Congress intended to give the agency the power to authoritatively construe the statute's preemptive scope. And competing interpretations of the statutory delegation most often will be available. While administrative statutes almost always have some

107. *Mead*, 533 U.S. at 227 (emphasis added).

108. Merrill & Hickman, *supra* n. 29, at 859.

109. *Chevron*, 467 U.S. at 844; Hickman & Krueger, *supra* n. 23, at 1242; Mendelson, *supra* n. 4, at 743; Merrill & Hickman, *supra* n. 29, at 870–72; Young, *supra* n. 1, at 892.

110. Particular constitutional restrictions may invalidate particular delegations, as I discuss below in Part IV. *See* Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 26 (1983).

111. *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *see* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum. L. Rev. 696, 878–79 (1998); Monaghan, *supra* n. 110, at 26–27.

112. *See* Monaghan, *supra* n. 110, at 28; *cf.* Merrill & Hickman, *supra* n. 29, at 864–72 (arguing that *Chevron* is best theorized as based on judicial deference to congressional intent).

113. 533 U.S. 218.

114. *Id.* at 229.

115. *Id.* at 228–31; Hickman & Krueger, *supra* n. 23, at 1246 (arguing that, under *Mead*, "reviewing courts must consider all circumstances surrounding the statutory scheme and agency action to ascertain whether 'Congress would expect the agency to be able to speak with the force of law' on the matter at hand").

116. *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (holding that "in a situation where state law is claimed to be pre-empted by federal regulation . . . the correct focus is on . . . the proper bounds of [the agency's] lawful authority to undertake such action"); Young, *supra* n. 1, at 896 (noting that "[a]gency action will thus be held to preempt state law if (1) the agency intended it to do so, and (2) the agency's preemptive action is within the scope of its delegated authority").

language delegating general implementing authority to an agency, Nina Mendelson has shown that Congress only rarely delegates specific authority over preemption issues.[117] This leaves general delegations ambiguous—they may be read to either include or exclude authority over preemption.[118] There is a persuasive case for thinking that Congress typically intends broad delegations to include preemption authority—that is, authority to issue *binding* constructions of the statute's preemptive scope.

First, as Roderick Hills argues, pro-preemption interest groups are (1) more regularly engaged with legislation than anti-preemption groups, and (2) likely to act in a way that actually *reduces* the public visibility of Congress's deliberations about preemption.[119] Since pro-preemption interests may be satisfied with statutory ambiguity, the absence of express preemption language or other readily identifiable expressions of intent does not necessarily rule out congressional intent to preempt.[120] Second, the obstacles to legislation "vetogates," and congressional strategies for overcoming them (bundling legislation into omnibus bills, for example), make it more likely that congressional delegations will be vague and that congressional intent regarding the scope of delegations will be ambiguous.[121] But Congress's motivation to enact lasting statutes, the difficulty of amending enacted statutes *ex post*, and pressure from similarly influential but opposing interest groups make delegation an attractive strategy and, consequently, make broad delegation more likely.[122] Thus, Eskridge

117. *See* Mendelson, *supra* n. 4, at 789–91, 790 n. 219; Mendelson, *Presumption*, *supra* n. 11, at 721, 721 n. 143 (giving examples).

118. For normative debates about whether to construe delegations broadly or narrowly, see e.g. Benjamin & Young, *supra* n. 20, at 2152–54 (emphasizing rules reinforcing Congress's role in defining agency powers); Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 Duke L.J. 1933, 2008–10 (2008) (express delegation of preemption authority is unnecessary); Manning, *supra* n. 103, at 252 (advocating narrow construction as a "means of avoiding serious nondelegation questions"); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 Colum. L. Rev. 2097, 2141–51 (2004) (similar to Benjamin & Young, *supra* n. 20); Metzger, *supra* n. 78 (suggesting that delegation is unproblematic because ordinary administrative law principles can effectively promote constitutional federalism values); Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 317–18 (2000) (similar to Benjamin & Young, *supra* n. 20) [hereinafter Sunstein, *Nondelegation Canons*]; Sunstein, *supra* n. 104, at 2111–14 (similar to Benjamin & Young, *supra* n. 20). There are also specific debates about whether it is normatively desirable to read such delegations to include preemption authority. *Compare e.g.* Galle & Seidenfeld, *supra* n. 118, at 2006–17 *with* Young, *supra* n. 1, at 886–87, 894–900.

119. Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. Rev. 1, 29–31, 34–35 (2007); *see also* Mendelson, *Presumption*, *supra* n. 11, at 709–10.

120. The conflict between pro and anti-preemption interests may result in a legislative compromise that omits, rather than includes, statutory preemption language, especially where the interests are fairly evenly influential. This fits with Baker and Krawiec's view that Congress tends to shirk political responsibility for policy choices whenever "two or more powerful interest groups are at odds over particular statutory language. In such instances, Congress may seek to employ statutory incompleteness to avoid *fully* alienating any interest group, while still retaining the freedom to argue to voters that they have enacted a statute that is prolabor, proenvironment, or conforms to some other ideology that has broad electoral support." Scott Baker & Kimberly D. Krawiec, *The Penalty Default Canon*, 72 Geo. Wash. L. Rev. 663, 674 (2004). *See generally* Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1 (1982).

121. *See* Bressman, *supra* n. 27, at 566–75; Eskridge, *supra* n. 3, at 1451–53.

122. *See* Bressman, *supra* n. 27, at 566–75; Eskridge, *supra* n. 3, at 1457; *see also* David Epstein & Sharyn O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers* 237–38 (Cambridge U. Press 1999) (arguing that delegations are used to counteract interest group influence); Sunstein, *Nondelegation Canons*, *supra* n. 118, at 324–25. As Merrill observes, empirical questions about the circumstances that lead Congress to delegate rather than legislate remain unsettled. Merrill, *supra* n.

claims that delegation of authority over preemption is probably anticipated and even intended where statutes "contain ambitious regulatory initiatives . . . together with massive delegation of responsibilities to agencies . . . ."[123] Third, as Sunstein and Bressman have pointed out, statutory ambiguity always amounts to a delegation of interpretive authority to either agencies or courts.[124] Courts are known to be inferior to agencies in general policy-related decisionmaking; and, though it is disputed, agencies may have an institutional edge on preemption as well.[125] Thus, when ambiguity is the best Congress could do, there are reasons to think that general delegations are meant to confer preemption authority on agencies.[126] Or, at the very least, there appears to be no decisive reason to presume that Congress meant to leave preemption to the courts rather than an agency.

Since it is plausible that general delegations of implementing authority often are meant to include preemption in the agency's portfolio, a rule avoiding *Chevron* likely will "bite" in many cases by selecting the less descriptively likely interpretation that the delegation does not include preemption authority. In *Levine*, for example, the Court construed the FDA's broad implementing authority under the FDCA not to include preemption authority—in part because the statute contains neither the express preemption language nor the kind of explicit delegation of FDA authority over some preemption issues that the MDA contains—and thus avoided even mentioning *Chevron*.[127] The bite is more straightforward where the statute has express preemptive language. As Mendelson observes, it is rare to get a clearer statement of congressional intent to delegate preemption authority to an agency than a general delegation of implementing authority along with express statutory preemption language.[128] Both the MDA and the NBA contained such language, yet the Court in both *Riegel* and *Watters* avoided the *Chevron* question.[129] If interpreting such statutes to delegate preemption

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118, at 2142. I just suggest that the evidence paints a complex picture and points in the direction of at least many very broad delegations including preemption authority even when preemption is not addressed in the statutory text.

123. Eskridge, *supra* n. 3, at 1460.

124. Sunstein, *Nondelegation Canons*, *supra* n. 118, at 329–30.

125. *See* Bressman, *supra* n. 27, at 568–69. On courts' general policy-making deficiencies, see *Chevron*, 467 U.S. at 844, 865; Mendelson, *supra* n. 4, at 744. For the view that agencies have greater capacity than courts for preemption decisionmaking, see Merrill, *supra* n. 1, at 755–58; Sharkey, *supra* n. 2, at 485–90. For doubts about administrative competence on preemption, see Eskridge, *supra* n. 3, at 1455, 1455 n. 56, 1457; Mendelson, *Presumption*, *supra* n. 11, at 698.

126. At times, the Court appears to have embraced this view. *See La. Pub. Serv. Commn. v. FCC*, 476 U.S. at 369 (agencies are empowered to preempt when "acting within the scope of [their] congressionally delegated authority"); *see also* Howard P. Walthall, Jr., Student Author, Chevron *v. Federalism: A Reassessment of Deference to Administrative Preemption*, 28 Cumb. L. Rev. 715, 732 (arguing that courts think general delegations include preemption authority); *but see* Mendelson, *supra* n. 4 (arguing judicial treatment has been unclear).

127. *Levine*, 129 S. Ct. at 1204–06. But the delegation question was not entirely unambiguous since the dissenters thought "Congress made its 'purpose' plain in authorizing the FDA—not state tort juries—to determine when and under what circumstances a drug is 'safe.'" *Id.* at 1189–91 (Alito, J., Roberts, C.J. & Scalia, J., dissenting).

128. Mendelson, *Presumption*, *supra* n. 11, at 698, 706–07.

129. The MDA contains express preemption language, 21 U.S.C. § 360k(a), general delegation language, *id.* at § 371(a), and an express delegation to the FDA of some preemption authority, *id.* at § 360k. *See Riegel*, 128 S. Ct. at 1000–01. The NBA contains express preemption language, 12 U.S.C. § 484(a), and general delegation language, 12 U.S.C. §§ 24, 93a, 371(a). *See Watters*, 550 U.S. at 6–8.

authority to agencies would raise constitutional doubts—as I argue below—then avoiding a construction of the statutory delegation that could give rise to *Chevron* deference by adopting a narrower construction of the delegation is fairly characterized as interpretive avoidance.[130] The delegation thus narrowly construed, the court would need to make an independent determination about the statute's preemptive scope.

But *Riegel* and *Watters* also avoided *Skidmore* deference, which does not necessarily depend on a construction of the statutory delegation of authority to the agency.

2. *Skidmore* Deference and Judicial Interpretive Discretion

The *Skidmore* standard provides for deference calibrated to the agency interpretation's "power to persuade."[131] Persuasiveness is measured by qualitative factors, including the interpretation's thoroughness, formality, validity, consistency over time, longevity, and contemporaneity with enactment of the statute, as well as the agency's expertise in the area.[132] *Skidmore* differs from *Chevron* because it applies to agency interpretations that are "not controlling upon the courts by reason of their authority . . . ."[133] In other words, *Skidmore* deference is not predicated on a finding that Congress delegated interpretive authority to an agency rather than to the courts.[134] While both constrain judicial interpretive discretion, *Skidmore*'s normative justification differs from *Chevron*'s. It is justified not by constitutional separation-of-powers norms but primarily by the instrumental norm favoring the interpretation made by the institution best situated to interpret correctly.[135] Underlying the norm is a basic value—we want to get the law as right as we can as often as we can. The default rule is that courts should interpret ambiguous statutes because courts have general expertise in statutory interpretation. *Skidmore* creates an exception by identifying instances where, even if Congress has not allocated interpretive authority to them, agencies are nevertheless the best situated interpreter—where proper interpretation requires expertise that an agency has and courts lack—and requiring judicial deference to harness agencies' institutional advantages. *Skidmore* promotes the basic value, and is thus justified, because it precludes judicial interpretation where it is likely to be second-best.

One might think that avoiding deciding whether to apply *Skidmore* deference is the functional equivalent of applying or rejecting *Skidmore* deference *sub silentio*. After all, on one view of *Skidmore*, the "persuasiveness" of the agency's interpretation may be determined simply by the extent to which it coincides with the court's own interpretation of the statute.[136] On this view, avoidance and application of *Skidmore* cash out to the

130. This is familiar—courts employ a variety of normative canons that require construing delegations narrowly despite *Chevron*. *See generally* Sunstein, *Nondelegation Canons*, *supra* n. 118.

131. *Skidmore*, 323 U.S. at 140; *Christensen*, 529 U.S. at 587 (quoting *Skidmore*, 323 U.S. at 140).

132. *Skidmore*, 323 U.S. at 140; Hickman & Krueger, *supra* n. 23, at 1258–59.

133. *Skidmore*, 323 U.S. at 140. There is confusion about *Skidmore*'s applicability. *See infra* n. 141.

134. *See* Bressman, *supra* n. 27, at 607.

135. *See* Hickman & Krueger, *supra* n. 23, at 1249; Young, *supra* n. 1, at 892.

136. Some think that courts cite *Skidmore* as cover for independent interpretation. *See* Hickman & Krueger, *supra* n. 23, at 1252–55 (discussing "the independent judgment model of *Skidmore* review" and citing Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. Pa. L. Rev. 549, 564 (1985); Richard W.

same thing where the court's interpretation has the same result with respect to preemption as the agency's interpretation would have had, if adopted; avoidance and rejection of *Skidmore* cash out to the same thing where the court reaches a different result with respect to preemption than would have obtained if the agency's interpretation had been adopted.

But most, including the majority of courts, view *Skidmore* as a *binding* constraint on judicial interpretive discretion: Where the qualitative factors make *Skidmore* applicable, a court must give special and often decisive weight to the agency's interpretation even if it differs from the interpretation the court thinks is best.[137] This makes sense of the idea that *Skidmore* is *deference*—"deference, to be meaningful," must require that the court's preferred interpretation be supplanted by the agency's where the deference applies.[138] For this to make sense in the *Skidmore* context, it must be that the "persuasiveness" of an agency interpretation is *not* determined solely by its correspondence to the court's interpretation. This is signaled by the *Skidmore* test: The validity of the agency's interpretation is but one criterion for deference, and it seems that "validity" requires only that the agency's interpretation be a plausible one, not that it correspond with the court's idea of the "correct" interpretation.[139] The court's and agency's interpretations may be the same, but they need not be; an agency's interpretation may be persuasive enough to qualify for *Skidmore* deference even if the court would reach a different result interpreting the statute independently. So, too, an agency's interpretation may fail to qualify for *Skidmore* deference even if the court would reach the same conclusion interpreting independently.

The question of *Skidmore*'s applicability is thus substantively distinct from the question of the proper interpretation of the relevant statutory provisions. When a court avoids deciding *Skidmore*'s applicability, it avoids evaluating the "persuasiveness" of the agency's preemption interpretation. Now, in a sense, this is like rejecting *Skidmore* deference in the particular case. But, unlike a prospective doctrinal rule that *Skidmore* deference is inapplicable to agency preemption interpretations, the avoidance approach leaves open the possibility that *Skidmore* might be applied to a preemption interpretation in a future case. While it is harder to see how the *Skidmore* question could be placed squarely before a court in the way that a clear delegation of specific agency authority to issue binding preemption interpretations might force courts to confront the *Chevron* question, it seems possible. For example, if a court is simply unable, for whatever reason, to reach its own independent conclusion about the preemptive effect of a statute, it might be forced to decide whether it can permissibly defer to an agency preemption interpretation under *Skidmore*. More plausibly, it seems like the parties to a case could force the issue by framing an appeal or certiorari petition to present only the question of

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Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 Ohio St. L.J. 1013, 1015 (2005)).

137. *See id.* at 55–59. Hickman and Krueger's empirical study of judicial treatment of *Skidmore* deference led them to conclude that "*Skidmore* deference, while less deferential than *Chevron*, is nevertheless highly deferential to administrative interpretations as applied." *Id.* at 1271. *Cf. Levine*, 129 S. Ct. at 1201 (evaluating the possibility of giving "some weight" to agency interpretations, and citing *Skidmore*, but not specifying how much deference would be appropriate).

138. Monaghan, *supra* n. 110, at 5.

139. *See Skidmore*, 323 U.S. at 140; Hickman & Krueger, *supra* n. 23, at 1258–59.

whether *Skidmore* deference to agency preemption interpretations is permissible. And Congress could draft a statute in a manner that presents the *Skidmore* issue directly—*e.g.*, by including a provision instructing courts to "consider the agency's views about the preemptive scope of this statute."[140]

In any event, since *Skidmore*'s applicability does not depend on construing the scope of the statutory delegation of agency authority, it appears that we cannot count avoiding *Skidmore* as an instance of interpretive avoidance.[141] Rather, it amounts to avoiding a decision about whether courts are constrained to defer to agency interpretations on non-statutory grounds. If according *Skidmore* deference to agency preemption interpretations raises constitutional doubts—as I argue below—then courts may avoid the question of *Skidmore* deference by independently determining the preemptive scope of the statutory provisions that are the subject of the agency's preemption interpretation. Since avoiding *Skidmore* does not weigh in favor of any particular interpretation of those provisions, but rather simply selects a statutory ground for the decision to avoid having to resolve the constitutional doubts about *Skidmore* deference to agency preemption interpretations, this is procedural, not interpretive, avoidance.

IV. CONSTITUTIONAL DOUBTS ABOUT AGENCY PREEMPTION AUTHORITY

So far, I have argued that *Riegel* and *Watters* stand for a rule that courts should avoid deciding whether to accord any deference to agency interpretations of the preemptive scope of federal statutes and that the rule is a hybrid of interpretive and procedural avoidance. I turn now to consider some constitutional doubts that might justify the deference-avoidance rule.

A. Nondelegation

There are a variety of judicial rules precluding particular interpretations of statutory delegations of authority to administrative agencies for normative reasons.[142] One enforces the general (and mostly hypothetical) constitutional bar on delegations of legislative power by narrowing delegations that might otherwise confer impermissibly

140. I am grateful to Tom McGarity for pointing this out to me.

141. After *Mead*, determining the scope of the agency's delegated authority may be a threshold requirement for all deference, not just *Chevron*. *See e.g.* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 Vand. L. Rev. 1443, 1463–65 (2005); Merrill & Hickman, *supra* n. 29, at 836; Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187, 191 (2006). *Chevron*'s rationale is that Congress has authority to determine whether courts or agencies will be the default interpretive authority. Thus, under *Mead*, the threshold question in the deference inquiry—the decision to apply *Chevron* or reject it in favor of *Skidmore* or independent judicial interpretation—requires determining where Congress intended to vest primary interpretive authority. *Mead*, 533 U.S. at 229–231; Hickman & Krueger, *supra* n. 23, at 1248–49, 1258; *see also* Bressman, *supra* n. 141, at 1466–67 (noting that under *Skidmore*, courts are default interpreters); Merrill & Hickman, *supra* n. 29, at 871 (under *Chevron*, agencies are default primary interpreters). But avoiding a preemption-authority-encompassing interpretation of the delegation will not always entail avoiding *Skidmore*. Courts often simply apply *Skidmore* rather than address *Mead*'s statutory threshold question. *See* Bressman, supra n. 27, at 605–06; Bressman, *supra* n. 141, at 1464–69. This may flow from confusing Supreme Court guidance, or, if the statutory delegation question is difficult, it may be legitimate interpretive avoidance to skip to *Skidmore*. *Id.* at 1451–57, 1464–69. And applying *Skidmore* itself depends not on a construction of the agency's delegated authority but on the quality of the agency's work on the specific statutory issue in the case.

142. *See generally* Sunstein, *Nondelegation Canons*, *supra* n. 118; Sunstein, *supra* n. 104, at 2105–18.

broad policy-making discretion.[143] Judicial use of this avoidance strategy, rather than full-on enforcement of the constitutional prohibition against delegations of legislative authority, is justified by: (1) the practical necessity of broad delegations of policy-making discretion in modern federal governance; and (2) courts' self-professed incompetence to distinguish permissible from impermissible amounts of delegated discretion where the question is one of degree.[144]

Similar but more specific rules preclude interpreting delegations to include particularly problematic categories of agency authority—that is, to restrict the delegation of certain *kinds* of discretion rather than a certain *degree* of discretion. Most relevant here are rules requiring that delegations be construed to exclude agency discretion to take actions that raise serious constitutional doubts.[145] The court has held, for example, that general delegations should not be construed to confer agency authority to take actions that arguably impinge the right to travel or that press the outer limits of Congress's power under the Commerce Clause.[146] If Congress were to specifically delegate agency authority to, say, regulate in a way that constrains individuals' right to travel, then the constitutional questions would be (1) whether Congress can impinge the right to travel and, even if so, (2) whether Congress can delegate that power to an agency. By requiring clear statutory language to accomplish these kinds of delegations, avoidance-type non-delegation rules effectively require Congress, rather than the agency, to take the constitutionally dubious action; they thereby avoid the further question of the constitutionality of the action if were done clearly by Congress.[147]

The deference-avoidance rule resembles a nondelegation rule in that it avoids only the question of deference; the court remains free to independently adopt the same substantive interpretation of the statute's preemptive that is advanced by the agency, as it did, for example, in *Watters*.[148] The only requirement is that deference to the agency cannot be among the reasons for adopting the interpretation. In preemption cases, courts may avoid *Chevron* deference by interpreting the statutory delegation to exclude preemption authority. To be sure, this may result in rejection of the agency's proposed preemption interpretation on statutory grounds. But because that result is not *entailed* by the avoidance rule, the rule's justification must arise from reasons why deference itself—not the substance of the agency's interpretation claiming deference—is constitutionally

143. *See Loving v. U.S.*, 517 U.S. 748, 758 (1996); *Mistretta v. U.S.*, 488 U.S. 361, 371–72 (1989); *see generally* Manning, *supra* n. 103, at 238–40; Merrill, *supra* n. 118, at 2102–09. For criticism of the avoidance approach, see generally Manning, *supra* n. 103, at 260–61; Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721, 1761 (2002).

144. *See Loving*, 517 U.S. at 758 (stating that "[t]o burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government."); *Mistretta*, 488 U.S. at 371–72) (making a similar point); *see also* Manning, *supra* n. 103, at 242 (finding that "the Court has long doubted its capacity to make principled judgments about such questions of degree"); Merrill, *supra* n. 118, at 2105.

145. *See Rust v. Sullivan*, 500 U.S. 173, 190–91 (1991); Sunstein, *Nondelegation Canons*, *supra* n. 118, at 331. For a more detailed account of these types of rules, see *id.* at 331–35.

146. *See Solid Waste Agency of N. Cook Co. v. U.S. Army Corps of Engrs.*, 531 U.S. 159, 172 (2001) (discussing the commerce clause); *Kent v. Dulles*, 357 U.S. 116 (1958) (discussing the right to travel).

147. As Sunstein points out, there are no clear answers here because "Congress has never attempted to do anything of this sort." Sunstein, *Nondelegation Canons*, *supra* n. 118, at 336.

148. *See supra* nn. 64–77 and accompanying text (discussing *Watters*, 550 U.S. 1).

dubious. For *Chevron*, it may be that delegation to agencies of the authority to issue binding preemption interpretations is constitutionally dubious. Two candidates for the source of this doubt are federalism and the constitutional source of Congress's preemption authority.

1. Federalism

Preemption, particularly where agency action is the purported source of the preemption, has substantial implications for federalism.[149] The general concern is that preemption, if not properly constrained, threatens to diminish state government authority below the constitutionally-required minimum threshold. Courts operationalize federalism concerns in preemption cases by applying a presumption against preemption at least where the potentially preempted state law is a matter of "traditional" state authority.[150] Courts have not settled the presumption's application where agencies attempt to affect preemption—either through preemption interpretations or directly preemptive action.[151] Some commentators propose requiring clear statements of congressional intent to permit agencies to take such actions.[152] They argue that this approach would promote federalism values because (1) the states are relatively better situated to protect their interests in Congress than in the administrative process, and (2) clear preemption delegations would have to traverse the full panoply of legislative hurdles in Congress, maximizing the states' opportunities to protect themselves and, in general, decreasing the number of such provisions that actually get enacted.[153]

This view of federalism's requirements may be correct and the suggested presumption may be constitutionally justified. But federalism norms do not justify a general deference-avoidance rule. Presumptions against agency preemption are asymmetrical in that they only bar deference where the agency advocates preemption. Presumably most federalism-minded commentators would be fine with deference where the agency opposes preemption—Eskridge found that agencies do so about one-third of the time.[154] Imagine that the *Riegel* Court *Chevron*-deferred to the FDA regulations

149. *See supra* n. 25 and accompanying text.

150. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *cf. Lohr*, 518 U.S. at 485 (suggesting that the presumption applies in *all* preemption cases).

151. *See Ruthardt*, 194 F.3d 176; Young, *supra* n. 1, at 885. Sunstein observes that, at least once, a court has applied a federalism-based presumption "that administrative agencies will not be allowed to interpret ambiguous provisions so as to preempt state law." Sunstein, *Nondelegation Canons*, *supra* n. 118, at 331 (citing *Natl. Assn. of Reg. Util. Commrs. v. FCC*, 880 F.2d 422 (D.C. Cir. 1989)).

152. *E.g.* Eskridge, *supra* n. 3, at 1467–70; John F. Manning, *Lessons from a Nondelegation Canon*, 83 Notre Dame L. Rev. 1541, 1563–66 (2008); Mendelson, *Presumption*, *supra* n. 11, at 706; Young, *supra* n. 1, at 886.

153. Eskridge, *supra* n. 3, at 1459–60; Mendelson, *Presumption*, *supra* n. 11, at 716–17; Young, *supra* n. 1, at 876–78.

154. Eskridge, *supra* n. 3, at 1478; *see id.* at 1470 (arguing that "the Court [is] right to interpret broad delegations cautiously when they are deployed by agencies to expansively to preempt state law"); Mendelson, *Presumption*, *supra* n. 11, at 724 (stating that a "presumption against agency preemption would, of course, mean that an agency could not be assumed to have the authority *to preempt state law* unless there is clear evidence that Congress so intended.") (emphasis added); Young, *supra* n. 1, at 885 (focusing on the set of cases "[w]here the agency does decide the preemption question itself and, in fact, interprets its statute to preempt state law," since these are the cases where the "*Rice* [presumption against preemption] and *Chevron* are in conflict"); *but see* Sunstein, *supra* n. 104, at 2100 (suggesting that nondelegation principles should constrain *Chevron* deference to agency interpretations that deny agency authority as well as to those that claim it).

exempting some state laws from preemption but accorded no deference to the FDA's amicus brief position favoring broad preemption.[155] No federalism-based clear statement rule or presumption would be triggered because there would be no preemption—since the underlying concern is to protect state regulatory authority, the proposed presumption only applies where deference would result in preemption.[156] But in *Riegel*, the Court avoided deferring to both a regulatory interpretation that disfavored preemption and an amicus brief interpretation that championed preemption.[157] And in both *Riegel* and *Watters*, the Court avoided deference while simultaneously reading the statutes to effect the very preemption that the agencies proposed.[158] Given these results, it would be odd to say that the Court avoided deference purely out of concern for preemption's effects on state regulatory authority.

But we do not want to sell federalism short. Some emphasize that the political and procedural safeguards for state interests at work in Congress are the primary mechanisms for protecting state governments.[159] On this view, regardless of the agency's position on preemption, avoiding *Chevron* deference is justified wherever a clear delegation is lacking because clear congressional action in delegating preemption authority to an agency—not a particular result on the substantive preemption question—is what federalism requires.[160] The problem is that this approach poses an empirical question: What kind of statutory language regarding delegations of preemption authority does Congress typically produce? As I mentioned, there are reasons to think that statutory ambiguity coupled with general delegations will normally be intended to confer preemption authority to the agency.[161] If that is so, then this process-federalism view does not, in fact, support construing delegations narrowly to exclude preemption authority and thereby avoiding deference.

Of course, congressional practice likely is shaped to some extent by the interpretive rules Congress believes courts will apply; so we might think that adopting a presumption against reading broad delegations to confer preemption authority on agencies would force Congress to make its delegations clearer. This argument would be more forceful if the judicial rules for interpreting delegations of preemption authority were settled. But since they are not, it is not obvious that current congressional practice with respect to delegating preemption authority is sufficiently reactive to judicial doctrine to support the argument that changing doctrine would result in different legislative results.[162] Broad, vague delegations may simply be what results from

155. *See supra* nn. 51–63 and accompanying text.

156. Put differently, if federalism norms were not sufficient to warrant rejecting the substance of the agency's statutory interpretation, it is unlikely that they nevertheless required avoiding deference. Since the deference avoidance rule applies equally where the agency *opposes* preemption, it might result in a court reading a statute to preempt more broadly than an agency believes it does. Where avoidance may actually cash out to less state autonomy than deference would have done, we should think the federalism advocate would favor deference.

157. So, too, in *Altria*, the Court noted, but avoided deferring to, an FTC amicus-brief interpretation opposing preemption. *See Altria*, 129 S. Ct. at 552–55; *see also supra* nn. 12, 63.

158. *See supra* nn. 55–63, 72–77 and accompanying text.

159. *See e.g.* Benjamin & Young, *supra* n. 20, at 2143.

160. *Id.* at 2134.

161. *See supra* nn.119–28 and accompanying text.

162. On the lack of settled judicial rules, see *supra* nn. 18–24, 81 and accompanying text.

running the idea of agency preemption authority through the political and procedural safeguards of federalism in Congress.[163] These problems would seem to move the deference avoidance rule away from a federalism-based justification.

2. Preemption's Authorizing Norms

Avoiding deference nevertheless might be justified if delegations of preemption authority are dubious in virtue of the constitutional basis for preemption. Congress's authority to preempt state law may be incidental to its enumerated powers, but the better account is that preemption is a distinct congressional power with a distinct—and unsettled—constitutional source.[164] The Supremacy Clause and the Necessary and Proper Clause are plausible candidates.[165] Either option makes for a distinct non-delegation question. It is not clear that Congress may delegate its Necessary and Proper Clause authority to agencies at all. It may be that the Necessary and Proper Clause is the source of Congress's authority to delegate lawmaking power to agencies in the first place; so it is at least a difficult question—one perhaps worth avoiding—whether Congress may delegate some aspect of the very power that authorizes delegations.[166] And the Supremacy Clause presents its own puzzles. The Clause is found in Article VI, quite separate from the "legislative powers" granted in Article I, and it mentions only courts. Even if the Clause empowers Congress to preempt state law, we might nevertheless wonder whether the peculiar features of the Clause raise constitutional doubts about delegations of preemption authority.

Avoiding constitutional doubts about whether Congress may delegate its preemption authority provides a plausible particularized basis for avoiding deference questions in preemption cases. Delegations of preemption authority raise constitutional doubts that are different from—and perhaps more difficult than—those raised by delegations of ordinary lawmaking functions. Since preemption's constitutional source is distinct, even if unsettled, the deference-avoidance rule may in principle be limited to disfavoring delegations of preemption authority. The rule's distinct and limited normative foundation, in other words, precludes the kind of threat to the general practice of congressional delegation that has rendered stricter non-delegation rules pragmatically unacceptable. But there are two other problems with justifying the deference-avoidance rule based on nondelegation norms. First, *Skidmore* deference will not always—or even

163. *See supra* nn. 119–28 and accompanying text.

164. *See* Pursley, *supra* n. 1, at 946–51; *compare* Merrill, *supra* n. 1, at 736–38 (arguing that preemption is based on the Supremacy Clause) *with* Gardbaum, *supra* n. 1, at 808–12 (arguing that some preemption is based on the Necessary and Proper Clause).

165. U.S. Const. art. I, § 8, cl. 18 (Necessary and Proper); U.S. Const. art. VI, § 2, cl. 3 (Supremacy).

166. For general doubt about delegating Necessary and Proper Clause power, see Merrill, *supra* n. 1, at 736–38. On the Necessary and Proper Clause as the source of Congress's power to delegate, see Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 Va. L. Rev. 1035, 1036–30 (2007); Merrill, *supra* n. 118, at 2129–31. This may provide a reason for rejecting agencies' authority to interpret the scope of their own jurisdiction—whether agencies have such authority remains contested. *See Miss. Power & Light Co. v. Miss.*, 487 U.S. 354, 387 (1988) (Brennan, Marshall & Blackmun, JJ., dissenting) (suggesting that "th[e]the Court has never deferred to an agency's interpretation of . . . its jurisdiction"); *see also* Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Noninterference (or Why* Massachusetts v. EPA *Got it Wrong)*, 60 Admin. L. Rev. 593, 614–15 (2008); Sunstein, *supra* n. 104, at 2097–2100.

often—depend on the statutory delegation.[167] If the deference-avoidance rule is to sweep in *Skidmore* as well as *Chevron*, it needs different or additional justification.

Second, and more fundamentally, interpretive canons designed to implement constitutional nondelegation norms beg, rather than answer, the question of which institution—agency or court—has authority to bindingly determine the preemptive scope of the statute. They are normative—value-driven—rules of statutory interpretation; one cannot say that they operate to disclose the "unambiguous" meaning of the statute under step 1 of *Chevron* because their very rationale—that certain kinds of actions should not be presumed to be authorized by a statute absent a clear statement from Congress—presupposes statutory ambiguity.[168] Recall that *Chevron* is based on the idea that Congress has delegated the authority to interpret statutory ambiguities to agencies rather than courts.[169] *Chevron*'s rationale is not limited to strictly textual agency interpretations; it seems that Congress could also delegate authority to an agency to apply normative rules of interpretation or to decide to "push the constitutional envelope" and place a constitutionally dubious interpretation squarely before a court. Additionally, since there appears to be no basis for thinking that courts will always be superior to agencies in assessing and applying the values promoted by normative rules of statutory interpretation, there is no obvious institutional capacity type-argument for presuming that Congress in general would intend for courts, rather than agencies, to handle the value-based portion of the interpretive task.[170] Judicial application of normative rules of interpretation to resolve ambiguous statutory delegation language therefore may invade interpretive authority Congress in fact intended to commit to the agency.

To the extent that Congress's power to delegate authority over preemption to an agency is merely constitutionally questionable, and not clearly impressible, there seems to be no reason for courts to presume that Congress intended for the judiciary, rather than agencies, to be responsible for applying an interpretive canon disfavoring constructions of agency delegations as including interpretive authority over preemption.[171] Lisa Bressman suggests that Congress often does not intend for agencies rather than courts to

167. *See supra* nn.131–40 and accompanying text.

168. Mendelson, *supra* n. 4, at 747–49.

169. *Mead*, 533 U.S. at 229; Mendelson, *supra* n. 4, at 747–48; *see also supra* nn. 104–12.

170. *See* Galle & Seidenfeld, *supra* n. 118, at 2008–10; Mendelson, *supra* n. 4, at 750–52; Metzger, *supra* n. 78. Such arguments may be available for particular rules. Mendelson, for one, argues that a judicial presumption against agency preemption is justified precisely because agencies are on-balance worse than courts at assessing federalism impacts. Mendelson, *Presumption*, *supra* n. 11, at 718–19. But this rationale for the presumption, again, asymmetrically calls for rejecting only agency interpretations that favor preemption.

171. As Bressman points out, Congress often delegates complex or controversial issues to agencies mainly *because* the issues are complex or controversial. *See* Bressman, *supra* n. 27, at 575–80, 603–04. There does not appear to be any compelling reason to presume Congress would not intend to delegate the controversial issue of the delegability of preemption authority to an agency. In general, agencies' institutional characteristics make them more capable of discerning, and more likely to follow, congressional intent in policymaking. *See* Bressman, *supra* n. 27, 602–04, 602 n. 266; William N. Eskridge, Jr. & Philip Frickey, *The Supreme Court, 1993 Term—Forward: Law as Equilibrium*, 108 Harv. L. Rev. 26, 71–72 (1994). And Congress can exercise more control over agency decision-making that judicial decision-making. *See* Bressman, *supra* n. 27, at 603–04 (discussing agencies' accountability to Congress and the President and mechanisms available to Congress to ensure that agency decisions will track legislative preferences). Nothing about the particular question of the delegability of preemption authority appears to render these reasons for delegating to agencies rather than courts any less compelling.

have primary responsibility for applying normative canons of interpretation.[172] She thus argues that where judicial deference raises constitutional doubts because of the agency's proposed interpretations raises constitutional doubts, courts should remand the issue to the agency for reconsideration of the interpretation in the light of the constitutional norms involved.[173] This may be a viable alternative to judicial avoidance of the deference question in most instances. And, as Bressman points out, the approach would have the benefit of focusing agencies and Congress on constitutional issues, which could lead to more democratically accountable constitutional decision-making.[174] But, since the implication is that the agency's post-remand interpretation would be entitled to deference, the agency-remand idea does not seem to resolve the problem where deference itself, regardless of the substance of the agency's interpretation, is the source of the constitutional doubt. And I argue that deference to agency preemption interpretations presents exactly this problem.

But there is another kind of argument for a continuing judicial role. The Constitution might simply *require* continuing judicial involvement in preemption decisions.

B. Judicial Power and Preemption

The common characteristic of *Chevron* and *Skidmore* deference is that both constrain judicial discretion to engage in *de novo* statutory interpretation—under *Chevron*, on the basis of congressional allocation of interpretive authority to an agency; under *Skidmore*, on the basis of judicial perception that an agency has superior expertise.[175] This is unproblematic in general: We accept that Congress may delegate authority to agencies to interpret ambiguous provisions as a lesser version of its legislative power; and courts may of course constrain their own discretion where deferring to an agency interpretation reduces the risk of error. But avoiding both forms of deference may be justified in preemption cases if constraining judicial interpretive authority *on preemption issues* raises constitutional doubts. I think that it does based on a few observations about constitutional structure and the Supremacy Clause.

It is pretty well-established that Congress possesses the primary constitutional authority to preempt state law.[176] The more interesting question is whether the Constitution has anything to say about who should determine whether and how much state law Congress has in fact preempted. Even if there is reason to doubt that the Supremacy Clause is the source of Congress's power to preempt; the Clause at least provides a constitutional rule of decision for these second-order preemption questions—

172. Bressman, *supra* n. 27, at 575–80, 603–04.

173. *Id.* at 617.

174. *See id.* at 617–19.

175. *Cf.* Monaghan, *supra* n. 110, at 5 ("Deference, to be meaningful, imports agency displacement of what might have been the judicial view *res nova*—in short, administrative displacement of judicial judgment.") (emphasis in original).

176. Hence the well-established doctrinal rule that "'[t]he purpose of Congress is the ultimate touchstone' of pre-emption analysis." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (citing *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)); *see also* Pursley, *supra* n. 1, at 939–40, 945–51.

it is a rule of priority, *viz.*, federal law governs and state law is preempted if the state law is "contrary" to federal law.[177] The Clause also may be read to designate courts as the exclusive venue for application of this decision rule. It clearly authorizes courts to decide when state law is "contrary" to federal law—in fact, the Clause expressly mentions *only* courts.[178] What is substantially less clear is whether any other governmental actor is authorized to make that decision.

The constitutional structure provides some insight. The Supremacy Clause is quite separate from the provisions defining Congress's powers. Article I, Section 8 enumerates congressional powers and Article I Section 9 limits them, but the Supremacy Clause is located in Article VI. To be sure, the Clause provides that constitutionally permissible laws will be "supreme" over conflicting state laws, but that text in itself appears to confer no additional power on Congress. The Clause is similarly separated from the provisions defining the executive power in Article II and the judicial power in Article III; but in its text the Clause expressly alters the *judicial power* by prescribing that where federal and state law conflict, courts must apply federal law.[179] Determining whether there is a conflict between federal and state law is a necessary analytical predicate to applying the Supremacy Clause's rule of priority. One plausible reading of the Supremacy Clause in the context of the rest of the Constitution, therefore, is that it dedicates to courts the specific task of determining whether state law is "contrary" to federal law.

There is some support for this reading in the historical record. The Supremacy Clause is one of the results of the "Great Compromise" between the large and small states at the Constitutional Convention. Ensuring the supremacy of federal over state law was a contentious issue and the Convention considered proposals to lodge authority to enforce federal supremacy with each of the three branches of the national government. The small states' New Jersey Plan proposed authorizing the executive's use of military force to coerce state compliance with federal law.[180] This and similar proposals were roundly rejected.[181] More plausibly, the large states' Virginia Plan contained, in its

177. *See* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo. L.J. 2085, 2088 (2000); Merrill, *supra* n. 1, at 735–37. For doubts about the Supremacy Clause as the source of Congress's preemptive authority, compare Dinh, *supra* n. 177, at 2088 (arguing that "the Supremacy Clause itself does not authorize Congress to preempt state laws") and Gardbaum, *supra* n. 1, at 773–77 (arguing that authority to constrain state regulatory authority cannot flow from the Supremacy Clause) with Merrill, *supra* n. 1, at 737–38 (arguing that the Supremacy Clause may be construed "as the source of [preemption] authority").

178. U.S. Const. art. VI.

179. *Cf.* Liebman & Ryan, *supra* n. 111, at 760–74 (discussing the structural relationship between Article III's grant of "arising under" jurisdiction and the Supremacy Clause in the light of events at the Constitutional Convention).

180. *See* James Madison, *Notes on the Constitutional Convention (July 15, 1787)*, in *The Records of the Federal Convention of 1787* [hereinafter *Farrand's Records*] vol. 1, 254 (Max Farrand ed., rev. ed., Yale U. Press 1937).

181. James Madison, *Notes on the Constitutional Convention (July 16, 1787)*, in *Farrand's Records* vol. 1, *supra* n. 180, at 255–56 (Randolph's criticisms of the "use of force" provision of the New Jersey Plan); James Madison, *Notes on the Constitutional Convention (June 18, 1787)*, in *Farrand's Records* vol. 1, *supra* n. 180, at 284–87 (Hamilton's criticisms of the idea of using force to ensure the supremacy of national law); James Madison, *Notes on the Constitutional Convention (June 19, 1787)*, in *Farrand's Records* vol. 1, *supra* n. 180, at 320–22 (Madison's criticisms of the New Jersey Plan, including "use of force" provision); *id.* at 322 (reporting Conventions' rejection of New Jersey Plan). *See also* James Madison, *Notes on the Constitutional Convention (May 31, 1787)*, in *Farrand's Records* vol. 1, *supra* n. 180, at 54 (noting Convention's rejection of

version of the enumeration of congressional powers, a provision authorizing Congress "to negative all laws passed by the several States, contravening in the opinion of the national legislature, the articles of . . . the Union."[182] Madison supported an even broader congressional power "to negative" any state law Congress judged "improper."[183] The alternative was leaving to courts the task of invalidating state laws that conflicted with federal law—Madison opposed this because, in his view, it would take too long in federal courts and state courts could not be trusted to fairly promote national interests.[184] Nevertheless, the Convention rejected the congressional negative in favor of an early version of what would become the Supremacy Clause.[185] Arguing against the negative on the day it was voted down, Pennsylvania's Robert Morris explained that "[a] law that ought to be negatived will be set aside in the Judiciary department and if that security should fail, may be repealed by a National law."[186]

The events surrounding its adoption thus suggest that the Supremacy Clause "delegate[ed] to judges (state and federal) what previously had been the [congressional negative's] function of voiding state law contrary to federal law" [187]; and some suggest that maintaining the supremacy of federal law is the central focus of the judicial power conferred by Article III. A structural consequence of this view would seem to be that while Congress may control the extent of federal court jurisdiction through its Exceptions Clause power, neither it nor any other actor may control federal judicial application of the Supremacy Clause rule where jurisdiction exists.[188] So too, where state courts exercise the "judicial power" by addressing the application of the Supremacy Clause—as they are empowered to do by the text of the Clause itself—their judgments must be independent. On this reading, the Supremacy Clause in its constitutional context both confers decisional authority on courts and confines that authority to courts alone. Of course the Supremacy Clause has important applications beyond preemption, but preemption is where the Clause currently makes most of its appearances.[189] If the Supremacy Clause rule may be applied solely by courts—that is, if courts have exclusive constitutional authority to determine whether there is an invalidating conflict between

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an earlier "use of force" provision for ensuring supremacy of national law presented in the original version of the Virginia Plan). *See generally* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1348–52 (2001).

182. Madison, *Notes on the Constitutional Convention (May 29, 1787)*, in *Farrand's Records* vol. 1, *supra* n. 180, at 21.

183. James Madison, *Notes on the Constitutional Convention (June 8, 1787)*, in *Farrand's Records* vol. 1, *supra* n. 180, at 164.

184. James Madison, *Notes on the Constitutional Convention (July 17, 1787)*, in *Farrand's Records* vol. 2, *supra* n. 180, at 27–28.

185. *See id.* at 28–29; *see also* Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 Notre Dame L. Rev. 1421, 1425–31 (2008); Dinh, *supra* n. 177, at 2090–91.

186. James Madison, *Notes on the Constitutional Convention (July 17, 1787)*, in *Farrand's Records* vol. 2, *supra* n. 180, at 29.

187. *See* Liebman & Ryan, *supra* n. 111, at 730; *see also id.* at 704; Clark, *supra* n. 181, at 1434–35; Clark, *supra* n. 177, at 1347–48.

188. The Exceptions Clause is at U.S. Const. art. III, § 2, cl. 2. *See* Liebman & Ryan, *supra* n. 111, at 819–23, 884–85 (stressing "Article III's overriding structural objective of maintaining the supremacy of federal law and neutralizing the effect of contrary law").

189. The status of the Constitution as supreme law is, after all, the basis for constitutional review in general. *Marbury*, 5 U.S. at 177–78.

state and federal law—then it would seem to follow that deference to administrative agency applications of the rule in the form of preemption interpretations is inconsistent with the constitutional structure and therefore impermissible.

One might question the conclusion that the constitution gives courts exclusive authority to implement the Supremacy Clause; a reading more sympathetic to modern limitations on the courts' decisional capacity might recognize concurrent implementing authority in the other branches. This points to an important qualification: The exclusivity of judicial power to apply the Supremacy Clause is limited, by the familiar terms of the judicial power itself, to the resolution of actual cases—instances where courts are called upon to issue an authoritative decision on preemption. Other actors may apply the Clause to make determinations about preemption in the ordinary course of their business; such determinations will govern unless and until they are challenged in court.[190] The point is that when such a challenge is made and an authoritative judicial resolution is called for, one plausible reading of the Supremacy Clause and the constitutional structure appears to require independent judicial application of the Supremacy Clause rule. If that is right, then deference to agency preemption interpretations in the judicial decisionmaking process would, indeed, raise constitutional doubts.

Grounding deference-avoidance on this particular constitutional doubt makes the rule seem similar to the Court's approach in the few contexts in which it has rejected deference on the ground that Congress delegated interpretive authority to courts rather agencies—examples include defining the scope of statutory causes of action and interpreting criminal statutes.[191] The important difference is that, in preemption cases, the Constitution rather than Congress allocates the pertinent interpretive authority. This highlights a more general point. Recognizing what I have called the constitutional "status" of preemption decisions has a powerful conceptual implication that may independently warrant avoiding deference. The determinative question in preemption cases is whether state law, properly construed, is so "contrary" to federal law, properly construed, as to require invalidation of the state law. While the point is often obscured by the heavy focus on statutory interpretation in preemption decisions, deciding this conflict question is constitutional review of the challenged state law.[192]

Judicial invalidation of preempted state laws is, at bottom, an application of the Supremacy Clause rule. Since *Marbury*, our practice has been to require independent judicial decisions on constitutional questions.[193] Yes, judicial constitutional interpretation is often informed by input from other governmental actors—the development of the Court's Eighth Amendment jurisprudence is a prominent illustration.[194] But it has become an axiom of our practice that the ultimate decision

190. Monaghan, *supra* n. 110, at 5.

191. *See e.g. Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649–50 (1990); *Crandon v. U.S.*, 494 U.S. 152, 177–78 (1990) (Scalia, O'Connor, & Kennedy, JJ., concurring); *see also* Merrill & Hickman, *supra* n. 29, at 839–40.

192. *See* Pursley, *supra* n. 1, at 917–18, 928–54.

193. *Marbury*, 5 U.S. at 177–78; Liebman & Ryan, *supra* n. 111, at 820–22; Monaghan, *supra* n. 110, at 11–12, 32–34.

194. *See e.g. Kennedy v. La.*, 128 S. Ct. 2641, 2649–50 (2008) (in construing the Eighth Amendment, "the

whether laws are valid or invalid under the Constitution is to be made independently by courts. This perhaps explains why, despite having abandoned the unworkable rule that courts generally should not defer to administrative agencies on "pure" questions of law,[195] the Court in *Smiley v. Citibank*[196] "assume[d] (without deciding)" that the question of whether a federal statute preempts state law "must always be decided *de novo* by the courts."[197] And most recently, in *Levine*, the Court emphasized that it has not yet "deferred to an agency's *conclusion* that state law is preempted,"[198] but rather has "considered [an] agency's explanation of how state law interfered with" regulations "as further support for *our independent conclusion*" about preemption.[199] Consideration of agency input is fine—in fact, it will often be desirable since deciding whether there is an impermissible conflict between federal and state law may require complicated policy determinations that are beyond judicial competence. But deference of any form that constrains independent judicial decisionmaking would seem to raise a serious constitutional doubt in the light of our tradition of constitutional review.

A rule that requires avoiding both *Chevron* and *Skidmore* deference to agency preemption interpretations may thus be justified as implementing the constitutional norms allocating decisional authority on constitutional issues generally, and preemption in particular, to courts. It is clear that courts have the relevant decisional authority, less clear that Congress has it, and still less clear that Congress can delegate it to agencies or that agencies have it independently. There are, of course, counterarguments that might assuage these constitutional doubts.[200] But the fact that the doubts exist (and are, in my view, serious) seems sufficient justification for the deference-avoidance rule. This does not preclude the application of other normative rules of interpretation in preemption cases. Non-delegation norms may warrant rejecting *Chevron* deference where preemption is not closely tied to the statute's plausible central purpose, for example. And federalism norms may be vindicated by continuing to apply the presumption against preemption in interpreting the statutory language to determine whether statutory preemption in fact occurs.[201] My point is that the deference-avoidance rule promotes distinct but not incompatible constitutional norms locating decisional authority with courts where the preemptive scope of a statute is ambiguous.

Importantly, these are what Young calls "'resistance norms': Constitutional norms that may be more or less yielding to governmental action, depending on the circumstances."[202] It may turn out to be constitutionally permissible for Congress to

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Court has been guided by 'objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions.'"); *see also* Monaghan, *supra* n. 110, at 34.

195. *See NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130–31 (1944); Monaghan, *supra* n. 110, at 29–30; Sunstein, *supra* n. 104, at 2094–96.

196. 517 U.S. 735.

197. *Id.* at 744.

198. *Levine*, 129 S. Ct. at 1201 (emphasis added).

199. *Id.* at 1203 (emphasis added).

200. *See e.g.* Merrill, *supra* n. 1, at 737–38 (arguing for a construction of the Supremacy Clause entailing that "all governmental actors—federal and state, executive, legislative, and judicial—have potential constitutional authority to decide whether the vindication of federal law requires displacement of state law.").

201. *Riegel* and *Watters* may be criticized for failing in this regard.

202. *See* Young, *supra* n. 34, at 1594.

expressly delegate to agencies the authority to issue binding preemption interpretations and thereby require *Chevron* deference from courts. But to find out, Congress must squarely present the question by enacting clear and specific statutory language making such a delegation. If the Court resolves the relevant constitutional doubts in favor of *Chevron* deference, then those doubts will no longer provide a reason to avoid *Chevron* in future cases, at least where there is a similarly clear statutory delegation. But constitutional doubts about *Skidmore* deference would remain. In general, resolving constitutional doubts in favor of a *congressional* power to displace judicial decisional authority on preemption does not entail that *courts* have a coextensive power to abdicate that authority on other grounds. Even under our hypothetical clear delegation statute, although the agency might claim *Skidmore* deference for an informal preemption interpretation, we might think that Congress only intended deference for interpretations bearing the "force of law" and thus that *Skidmore* deference remains constitutionally doubtful. In any event, substantive resolution of constitutional doubts about the propriety of deference where there is an explicit allocation of interpretive authority on preemption is a question for another day.[203]

V. CONCLUSION

The deference-avoidance rule avoids constitutional doubts generated by treating agency interpretations as a binding constraint on judicial interpretation of a statute's preemptive scope. The constitutional separation of powers is thought to have its own normative force—the rule's justification thus does not depend on the fact that it may advance federalism interests by restricting preemptive decisionmaking to Congress. Nor does it depend on the constitutional norm that appears to restrict the initial exercise of preemptive authority to Congress, although the *Chevron*-avoiding part of the rule may find alternate justification there. It is sufficient to support the Court's approach in *Riegel* and *Watters* that the Constitution appears to grant decisional authority to courts where the question is whether state law has, in fact, been preempted.

203. Judicial enforcement of separation-of-powers norms has been inconsistent. *See e.g.* Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 Duke L.J. 449, 450 (1991); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?* 72 Cornell L. Rev. 488, 489 (1987).